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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNION NATIONAL BANK OF LITTLE ROCK,

Petitioner,

v.

MELVIN PAXTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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UNION NATIONAL BANK OF LITTLE ROCK,

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On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case concerns an appellate court's proper exercise of its powers to review a district court decision based on incorrect legal principles and clearly erroneous findings of fact.

In 1976, respondent Melvin Paxton filed a class action lawsuit against Union National Bank alleging race discrimination in hiring, testing procedures, promotions, discharges, job assignments, compensation and other terms and conditions of employment. This case was consolidated with two other lawsuits and five additional black persons were allowed to intervene. The plaintiffs and intervenors moved to certify the consolidated cases as a class action pursuant to Rule 23, Fed. R. Civ. P. The district court began an evidentiary hearing on the certification issue but later merged the certification hearing with the trial on the merits. The combined hearings took place in two parts - April, 1980 and August, 1980 - and continued for fifteen days before the original district court judge. In October, 1980 the original

judge recused himself. The case was reassigned and the successor judge informed the parties that he would not rehear the witnesses from the first fifteen days of trial testimony. The plaintiffs had presented the bulk of their case in chief before the original judge. This included the testimony of the two named plaintiffs and three of the four[1/] intervenors with live controversies. The trial resumed in April, 1981 and continued for eleven additional days. The plaintiffs had generally proceeded on a class-wide basis. The defendant had then fully presented its defense as to all class and individual claims. At the close of the evidence, the district court found that there was no class discrimination by the defendant Union

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1/ One of the original five intervenors had settled his case prior to trial.

National Bank. The court therefore reasoned that class certification was inappropriate:

> These plaintiffs and intervenors fail at the very outset because they have failed to prove employment practices and procedures of Union National Bank which discriminate against any class of their employees. It follows that these plaintiffs and intervenors could not be members of such a class.

Appendix B to Petition, p. 98a. The Eighth Circuit reversed the district court for its failure to certify any class because its reliance on the merits of the class claims improperly influenced the decision on the class certification and resulted in the use of an incorrect legal standard. Further, the district court's erroneous conclusions on the merits caused it not to give proper consideration to the requirements of Rule 23, Fed. R. Civ. P. The Eighth Circuit also reversed the district court

on the merits of the promotional[2/] claims because the findings were clearly erroneous.

REASONS FOR DENYING THE WRIT

The questions presented challenge the Eighth Circuit's exercise of its appellate jurisdiction. The petition should be denied because it presents no conflict of decisions among the circuits and because it presents no conflict with the decisions of this Court. Moreover, The Eighth Circuit opinion raises no important or new issues of law, but rather applies well-established principles from this Court's decisions in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), and

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2/ The court of appeals also found that a class of discharged employees should have been properly certified, but did not set aside the finding of no discrimination with respect to that class.

Pullman-Standard v. Swint, 72 L.Ed.2d 66 (1982), to a district court's flawed legal analysis of a complex factual situation.

ARGUMENT

I.

THE EIGHTH CIRCUIT PROPERLY APPLIED THIS COURT'S DECISION IN PULLMAN-STANDARD V. SWINT

Petitioner asks this Court to review whether or not the Eighth Circuit paid "lip service" only to the clearly erroneous rule. It does not claim that the Eighth Circuit was unaware of Pullman or that it, as the Fifth Circuit had in Pullman, utilized the "ultimate fact" analysis to reverse some of the findings of the district court. Rather, petitioner's argument rests upon speculation concerning the possibility that the rule might have been

avoided.[3/] This assertion is not supported by the record.

The court of appeals acted well within its sphere to refrain from substituting its judgment as to disputed facts and correctly exercised its supervisory functions. It properly stated and applied the appropriate rule of law and assessed the case as follows:

> After a careful review of the 6000 page transcript comprising this record on appeal, we are left with the firm conviction that the district court erred in holding that the bank did not discriminate against black employees with respect to promotions. See United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)

Appendix A to Petition, p. 17a. The court

3/ Similarly, the petitioner suggests that the Eighth Circuit, though acknowledging the proper standard, did not use the abuse of discretion standard in reviewing the decision on class certification.

thus reviewed the "entire evidence"[4/] before concluding that "a mistake [had] been committed." United States v. United States Gypsum Co., 333 U.S. 364 (1948). Doubts concerning the Eighth Circuit's application of the correct standard are dispelled upon review of its treatment of the various factual issues. Such a review demonstrates that the court of appeals gave due deference to the findings of the district court and did not engage in an independent evaluation. An unambiguous example involved the lead plaintiff, Melvin Paxton. Shortly after filing his charge of discrimination, Paxton was called into the office of the personnel director and questioned at length about the reasons for

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4/ The petitioner apparently equates a review of the record with independent fact-finding. In fact, one could hardly consider the entire evidence without reviewing the record.

his charge. The facts surrounding his subsequent resignation were disputed and the court of appeals held:

> While we do not believe that the record supports the view that Paxton was an unsatisfactory employee and while we believe that a factfinder could have found that Paxton was constructively discharged, we are unable to say that the trial court's finding with respect to the alleged discharge is clearly erroneous. We likewise hold that the trial court's finding that Paxton was not hired as a management trainee was not clearly erroneous.

Appendix A to Petition, p. 34a. Further evidence that the court of appeals applied the correct standard include:

a) Although the Eighth Circuit found no support for an alleged explanation 5/ for the higher discharge rate of blacks, it affirmed the

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5/ "We find no support in the record for the district court's observation that more black employees in the target group were discharged than white employees because the black persons hired were less qualified than their white counterparts." Appendix A to Petition, p. 24a n.22.

finding that the discharge class had not been discriminated against.

b) Although the Eighth Circuit found that the district court erred in characterizing Jerry Riley's promotional claim to computer operator trainee 6/ and further found that Riley was qualified and had made out a prima facie case of discrimination, it affirmed the district court's finding of non-discrimination with respect to this claim and with respect to his claim of discrimination in promotion from trainee to computer operator.

In sum, after considering all the evidence the court of appeals was diligent in not reversing findings which were in any way supported by the record. See also Appendix A to Petition, p. 34a (findings as to three other individuals not clearly erroneous)

6/ "The district court characterized Riley's claim as being much broader involving all persons hired as computer operators after August, 1977. The district court clearly erred in doing so." Appendix A to Petition, p. 28a n.24.

The petitioner asserts a further conflict with Pullman on the class certification issue by claiming that the court of appeals did not "give proper deference to the district court's findings of fact that the named parties could not represent the class." Bank's Petition, pp. 15-16. The district court, however, had allowed its erroneous view of the merits to affect its consideration of the class issue and did not make proper findings on the elements of a class certification. For example, the court declined to make any finding with respect to the adequacy of representation requirement because of its belief that no class discrimination had been shown:

> It is not necessary to discuss the fourth requirement of Rule 23(a). It is hardly necessary to inquire as to whether these plaintiffs and intervenors

> could adequately represent a class when their proof has failed to delineate any class who should be represented.

Appendix B to Petition, p. 100a. The district court simply had no factual or legal basis for its failure to certify the class.

The Eighth Circuit thereupon properly determined that the claims of the plaintiffs were typical, for here the "record permits only one resolution of [that] factual issue." Pullman, supra, 72 L.Ed.2d at 82. Because the district court applied an erroneous view of the law on class certification, it completely ignored the facts which demonstrated the typicality of plaintiffs' claims. The evidence, when properly considered, showed that there were other members of the class with similar grievances. Appendix A to Petition, pp. 14a-15a. Under the facts of this case, a

remand was not necessary.[7/] Even if the district court had initially made a contrary finding using the correct legal principles, the record would not have supported such a finding.

II.

IN CONCLUDING THAT THE BANK HAD DISCRIMINATED IN PROMOTIONS, THE EIGHTH CIRCUIT APPLIED PRINCIPLES ESTABLISHED BY THIS COURT AND CONSISTENTLY FOLLOWED BY OTHER CIRCUITS

The petitioner argues, alternatively,

7/ The district court did not actually make a finding on the requirement of typicality. Even if it had, such a finding could not have stood because of the erroneous view of the law applied. Pullman-Standard v. Swint, supra, 72 L.Ed.2d at 79. See also Kelly v. Southern Pacific Co., 419 U.S. 318, 323 (1974); United States v. General Motors Corp., 384 U.S. 127, 141 n.6 (1966). The petitioner apparently believes that the district court should have a chance to make a finding in petitioner's favor under the correct legal standard. There are, however, no facts cited by the petitioner or by the district court or contained in the record which support a finding other than that reached by the Eighth Circuit. Any other finding would have thus been clearly erroneous.

that the decision by the district court was not, in fact,[8/] clearly erroneous. Central to this theme is a criticism of the court of appeals treatment of certain statistical evidence. More specifically, the petitioner questions the Eighth Circuit's crediting the evidence of significant disparities within the bank's workforce -- upper level jobs being held almost exclusively by white persons. However, the court of appeals merely recognized, as this Court has consistently observed, that gross statistical disparaties in a workforce during the relevant time period may alone constitute a prima facie case of

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8/ The petitioner would thrust this Court in the position of reviewing the entire evidence again to determine if a clearly erroneous holding were justified. The arguments of the amici also generally address the overall merits of the claims of discrimination.

discrimination. Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15, 339 n.20. This fundamental concept had been uniformly recognized by courts of appeal, but completely ignored by the district court. See, e.g., Johnson v. Uncle Ben's, Inc., 628 F.2d 419 (5th Cir. 1980), cert. denied, 74 L.Ed.2d U.S. 277 (1982); EEOC v. American National Bank, 652 F.2d 1176 (4th Cir. 1981), cert. denied, 74 L.Ed.2d 186 (1982); Kirby v. Colony Furniture Co., 613 F.2d 696 (8th Cir. 1980). The district court compounded its error by ignoring other indicia of discrimination which have traditionally been relied upon by courts. In addition to the gross statistical disparaties, the following evidence was presented by plaintiffs

in support of the allegations of discrimination:

a) A showing that the bank had a history of discrimination and that the bank hired very few black persons prior to 1973. See, e.g., Hazelwood School District v. United States, supra, 433 U.S. at 309, n.15; Pettway v. America Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974).

b) A showing that the bank did not post notice of vacancies and recruitment was by word-of-mouth until at least 1979 when an incomplete, and often untimely, system was instituted. See, e.g., Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982 (1972); U.S. v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975).

c) A showing that promotional decisions were controlled by whites who used subjective criteria in selecting individuals for promotion. See, e.g., Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Reed v. Arlington Hotel Co., 476 F.2d 721

(8th Cir.) cert. denied, 414 U.S. 854 (1973); Stewart v. General Motors Corp., 542 F.2d 445 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977).

d) A showing that acts of racism in the bank were not dealt with firmly and fairly. See, e.g., Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972); Williams v. Owens-Illinois, 469 F. Supp. 70 (N.D. Cal. 1981), aff'd in relevant part, 665 F.2d 918 (1982), cert. denied, 74 L.Ed.2d 283 (1982).

Appendix A to Petition, pp. 17a-18a. The plaintiffs also showed that the affirmative action program had not been effectively communicated to all supervisors and that adherence to the policy was not mandatory on top management. The combination of all these factors had a devastating effect on the promotional opportunities of blacks at Union National Bank. The court of appeals summarized the almost total exclusion of blacks in upper level positions:

> At the time of trial, all but one of the twenty-five vice presidents and assistant vice presidents were white. All division heads were white, as were fifty-four of the fifty-six persons having hiring or firing authority at the bank. Seventy-seven of eighty bank officers were white, and twelve of the thirteen branch banks were managed by white employees. No black employee was promoted to the position of teller until after this action was commenced and only one black had been appointed a senior teller by the time the trial occurred.

Appendix A to Petition, pp. 19a-20a.

The petitioner attempts to suggest that there is a possible conflict with this Court's decision in Hazelwood School District v. United States, supra, by alluding to certain unspecified "special qualifications." However, the record reveals that there were no discernible objective qualifications for promotion within the bank. The one "qualification"

most seriously suggested[9/] by the bank was educational attainment. The evidence showed that there was no significant difference[10/] between the educational attainment of blacks and that of whites within the bank's workforce.

9/ The bank would not actually claim that any particular educational level was a requirement for promotion or for hire. There was no evidence presented to demonstrate that any such alleged qualification was job related under the standards set forth in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

10/ The average educational level of blacks was 13.1 years while that of whites was 13.5 years.

In sum, this case presents no conflict with Hazelwood because there are no "special qualifications" identified by the petitioner or revealed in the record.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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